STATE OF MICHIGAN

COURT OF APPEALS

ALLIANCE FOR CHILDREN, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

DETROIT PUBLIC SCHOOLS,

Defendant-Appellee/Cross-Appellant,

and

BADRIYYAH SABREE,

Defendant.

UNPUBLISHED
September 16, 2010

No. 291926
Wayne Circuit Court
LC No. 07-706714-CK

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Alliance for Children, Inc. (Alliance) disputes the trial court's determination that it violated its contract with Detroit Public Schools (DPS) and challenges the trial court's denial of its claim that DPS violated the fair and just treatment clause, Const 1963, art 1, § 17. Alliance also contends it was entitled to an award of additional monies for tutoring services actually provided to DPS students. DPS cross-appeals and asserts the trial court correctly ruled that Alliance was in breach of contract but erred in awarding any monies under the equitable doctrine of unjust enrichment and denying case evaluation sanctions. We affirm the trial court's determination that Alliance breached its contract with DPS but vacate the award of monies to Alliance. We remand to the trial court for determination of case evaluation sanctions.

Alliance entered into a contract with DPS for the 2005-2006 school year to provide after-school tutoring or supplemental educational services ("SES") for eligible students in accordance with the No Child Left Behind Act (NCLBA)[1]. Alliance was one of numerous providers of SES services to DPS students for the school year at issue. All contractors were provided the same

[1] 20 USC § 6316.

contractual agreement. DPS sought to schedule a meeting with Alliance on February 3, 2006, to discuss concerns regarding Alliance's failure to adhere to various contract provisions and complaints received regarding Alliance's delivery of services. Alliance's president, Dr. R. Austin Smith, Jr., indicated he was ill and unable to attend. On February 13, 2006, DPS' general counsel, Jean-Vierre Adams, sent a letter to Smith advising him of the termination of the contract citing the contract provision pertaining to its right to terminate "for any reason authorized under federal or state law." Indicating that Alliance had breached the terms and conditions of the contract, DPS specifically referenced the failure of Alliance "to provide tutorial services" and to pay its tutors in a timely manner.

Alliance first sued DPS in federal district court including among its seven claims, "wrongful termination of contract" and "wrongful removal from approved list of service providers."[2] Alliance's federal law claims asserted violations of the NCLBA, the Due Process Clause, and the First Amendment.[3] In dismissing Alliance's claims, the federal court ruled Alliance "failed to state a redressable claim" because "the No Child Left Behind Act does not create a private right of action for the plaintiff." The federal court declined "to exercise supplemental jurisdiction over the state law claims."[4] Alliance then initiated an action in circuit court, alleging: (a) breach of contract, (b) tortious interference with contract and business relationships, (c) declaratory and injunctive relief, (d) violation of fair and just treatment clause, and (e) defamation. By the time of the bench trial all of Alliance's claims, with the exception of breach of contract and violation of the fair and just treatment clause, had been dismissed.

Before the conclusion of proofs, the trial court determined that DPS had the authority to terminate the contract and recognized the distinction between DPS' termination of the contract with Alliance from the removal of Alliance as an approved provider from the list compiled by the Michigan Department of Education, but denied DPS' request for a directed verdict. The trial court issued an opinion and order, which included as a "finding[] of fact" the existence of a valid contract between the parties and the breach of several provisions of that contract by Alliance. The trial court specifically noted as performance deficiencies that: (1) Alliance failed to submit timely and accurate invoices, (2) the invoices submitted by Alliance did not comply with contractual requirements, (3) Alliance failed to conduct criminal background checks.

Despite having found the existence of a valid contract and breach of that contract by Alliance, the trial court went on to determine that because "DPS did receive a benefit from the services performed by Plaintiff . . . . Defendants would therefore be unjustly enriched if they were permitted to withhold payment for the services rendered by Plaintiff." The trial court awarded Alliance $32,282.50 in compensation "based on the equitable principle of unjust enrichment," having determined that the evidence demonstrated that Alliance did administer pre-tests, provided some tutorial services and "in some cases" prepared individualized prescriptive

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[2] *Alliance for Children, Inc v Detroit Pub Sch*, 475 F Supp 2d 655 (ED Mich, 2007).

[3] *Id.* at 656.

[4] *Id.* at 657.

plans for certain eligible students. The trial court rejected Alliance's constitutional claim under the fair and just treatment clause.

Post-judgment motions were filed. DPS sought case evaluation sanctions under MCR 2.403. Alliance sought to amend the judgment to increase the monetary award to $53,700 arguing entitlement to a $75 registration fee for those students identified as receiving compensable services. The trial court increased the total monetary award to Alliance to $43,982.50, which rendered DPS' request for sanctions moot. The trial court justified the $11,000 increase by calculating the $75 registration fee for each of the 156 "children . . . properly enrolled in the program as indicated by the signature of the parent." This appeal ensued.

Substantial and compelling evidence exists to support the trial court's finding that Alliance materially breached its contract with DPS. The easiest means to demonstrate this is to examine specific contract provisions and the evidence demonstrating Alliance's failure to meet these contractual requirements.

The NCLBA[5] requires a parent or guardian's consent be obtained for the provision of services to a student. This provision is incorporated in the DPS contract in Section G, ¶ 2, which required a parent's signature on supporting documentation submitted with invoices for payment. The existence and importance of this requirement was acknowledged at trial by several members of Alliance's staff, including its president, two tutors (Barbara Philyaw and Betty Jones), and billing consultant (Willie LeRoy Walker). Badriyyah Sabree, who served as the acting executive director for DPS in 2005 to 2006 school year, testified regarding the importance of procuring a parental signature. Sabree indicated that tutoring is not to be initiated without having first procured written parental approval.

Despite the necessity of securing written parental authorization before delivery of any services, DPS demonstrated that the requisite signatures were not included on documentation submitted by Alliance. Sabree's spot check showed that many of the documents submitted by Alliance lacked parental signatures. Patricia Owens, the Title I officer for DPS, reviewed all the forms submitted by Alliance for payment. Of the 672 forms received only 125 documents included both a parental signature and a pre-test score for an eligible student. Approximately 200 documents contained only a parental signature or a pre-test score. Philyaw acknowledged that several of the forms submitted by Alliance lacked parental signatures. Even Alliance's own billing coordinator, Walker admitted that several of the invoices submitted were missing parental signatures.

Section C, subsection B(1) of the contract mandates that "[t]he Contractor shall provide a Pre-Test Assessment . . . report to the District." Pre-testing data was important to the program as a basis to determine an individualized learning plan for an eligible student and to set measurable learning goals in math and reading. According to Sabree, pre-testing assessments were "important to understand where the children start."

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[5] 20 USC § 6316(e)(3).

Alliance failed to routinely comply with this mandate. Although Philyaw concurred with the importance of conducting pre-testing assessments, when confronted with documentation on specific students she acknowledged the absence of any assessment data or scores. Philyaw demonstrated a level of confusion regarding the necessity of completing pre-assessment testing before initiating tutoring services and acknowledged that tutors could be working with students before having developed a prescriptive plan. Jones, another Alliance tutor, confirmed the failure to include assessment data on forms for specific students. Sabree noted that her spot-checking of documentation submitted by Alliance showed that most did not contain pre-assessment data. This was confirmed by Walker, who also acknowledged that "most" of the documents submitted by Alliance lacked pre-testing scores. According to Owens, a provider is not entitled to a registration fee "until after the pre-test was given and the individual learn [sic], Individual Education Plan had been completed and the parent had signed off."

As defined by the contract, Alliance had the responsibility to develop "[a] statement of specific achievement goals for the Student" and to define timetables and descriptions to measure student progress.[6] Sabree described the development of an individualized learning plan for each student to comprise "the crux of the program." According to the assistant principle at Pershing High School and the site coordinator for the provision of SES for DPS at that location, Jennifer Martin concurred that the development of individualized prescriptive plans were "very important to increase student achievement, which was the objective of the program."

Contrary to this directive, the documentation submitted by Alliance was not individualized but rather standard boilerplate language that was vague and identical for every student. Philyaw acknowledged the similarity in all plans submitted. Jones confirmed the use of standardized language for all of the children. In response to questions posed by the trial judge, Jones acknowledged that despite the absence of any pre-assessment testing scores, pre-typed goals comprising a prescriptive learning plan could be found on a student's form.

Owens' review of the documents submitted by Alliance revealed "there was no prescriptive learning in terms of what goals and objectives would they cover for those children . . . . There was the same language on all of them." Sabree's review of select documents led her to conclude that the learning plans submitted by Alliance were, based on their uniformity, not individualized for each student as required under the contract language. Martin denied ever having observed "a prescriptive program for any of the children involved" at the Pershing site.

Smith admitted that these responses were not only the same for every student but were pre-determined as the "[s]pecific achievement goal for the student may very well have been pre-typed because the achievement goal, the minimum would be the same."

In Section I of the general contract clauses, ¶ 6 required "[a]ll Contractor employees working on this contract shall have a criminal background check . . . . Failure to properly investigate and certify past criminal convictions may result in termination of contract. The Contractor shall be inspected to ensure compliance." At deposition, while Smith acknowledged,

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[6] Section C, subsection A(8) of the contract.

"it is a requirement of the statute that anyone providing services must ensure that those staff members who are servicing children have an appropriate criminal background check," he indicated that this requirement was fulfilled by his hiring of DPS teachers as tutors. But Smith also acknowledged that at least six Alliance employees were not DPS employees. Although Sabree concurred that DPS teachers were required to undergo criminal background checks, it was not sufficient for Alliance to rely on their current employment with DPS to fulfill the contract requirements. Owens concurred, testifying that providers were required to secure criminal background checks "because they couldn't certify that a person had been cleared because they worked for DPS."

The contractual requirement to obtain criminal background checks along with the potential for termination for failing to do so was reviewed with all providers, including Alliance, at an initial meeting at the onset of the contract period. Further complicating this matter was the failure of Alliance to provide DPS with a list of tutors. While Smith contended that DPS was aware of the identity of Alliance's tutors through the billing sheets, Owens asserted that DPS "never received a list of who the tutors were or any background clearances on anyone."

Contractual provision Section C, subsection 13(a) required Alliance "to pay their employees (tutors) in a timely manner." In his deposition, Smith admitted, "[t]here was a period of time we got behind in paying people, that is to say we were late." Philyaw confirmed that "a couple of tutors" complained about late payment of their fees, which she brought to Smith's attention. In fact, Alliance "missed one payroll." Jones went further and confirmed that the morale of the tutors was impacted as "[n]o one had been paid" in November, December or January of the contract term and that to her knowledge no payments were ever received. Martin also confirmed that tutors were dissatisfied and quitting because of Alliance's failure to pay their fees. The Assistant General Counsel for DPS, Jean-Vierre Adams, testified that Smith acknowledged that 40 Alliance tutors had not been paid. Alliance was also not in compliance with the contractual provision requiring providers to be "financially sound" before delivering services within the district as Smith admitted he was unable to finalize a financing agreement for this enterprise until December. Smith admitted to Adams "at the time that the contract was entered into that he did not have the financial ability to implement the program."

The contract required that contractors such as Alliance "shall provide regular feedback to the Students and teachers on what they are learning and all assessment results." Part of the responsibilities of each contractor included "[a] description of how the student's parents and the student's teacher(s) will be regularly informed of the student's progress." Contrary to this directive, Jones' testimony demonstrated Alliance's failure to comply by its tutors conducting only random interactions with parents and not requiring a definitive method and schedule for contact. Sabree's review of select Parent/Guardian Provider Agreements led her to conclude, "there was not parental involvement."

The contract is also explicit that services are to be provided "only to 'eligible' students," which are defined to comprise "child[ren] who qualif[y] for free or reduced lunch as determined

by Federal guidelines, attend a school that did not meet AYP, and in grades K-12."[7] The District would only receive reimbursement for eligible students from the federal program and it was clearly stated within the contract that "[a]ny Services provided by the Contractor to a Student without 'approval' from the District for that specific Student shall be provided at the Contractor's sole risk and will not be paid for the services." Despite being apprised of this non-negotiable requirement, Alliance submitted invoices seeking payment for approximately 250 children determined by the District to be ineligible for participation in the program.

Section G of the contract delineates the content requirements for all invoices submitted and the deadlines. Alliance's own employees acknowledge the failure to comply with the contract requirements in this regard. Walker admitted the initial set of invoices submitted by Alliance to DPS were "unsatisfactory." Most of the documents lacked pre-test scores and others failed to include a parent or guardian signature. Walker acknowledged that the deficiencies in the invoices could be comprised of the omission of one or multiple requirements and that it was impossible to determine whether any of the invoices fully complied with contractual requirements.

Owens confirmed the problems encountered with the invoices submitted by Alliance and their failure to correct the deficiencies. Despite being given multiple opportunities to correct their submissions, Alliance continued to present invoices that could not justify payment. Adams confirmed correspondence being sent from DPS to Alliance regarding the invoice deficiencies on March 24, 2006, March 31, 2006, and September 25, 2006, however, Alliance failed to respond. Even beyond the fact that Alliance's final submission of invoices was late, additional problems continued exist because the documentation was not complete.

The untimely submission also precluded the possibility of payment as DPS received the invoices after the submission of a carry-over budget. Owens explained the importance of receiving invoices before the development of a carry-over budget. The carry over budget was submitted on February 14, 2007, and despite three letters to Alliance notifying them of deadlines in January 2007 for submission of their corrected invoices in order for there to be any possibility of payment, Alliance did not re-submit their documentation until March of 2007. At this point, there were no monies remaining in the carry over budget to pay the invoices and DPS could not receive any reimbursement from Title I funds.

To sustain an action for breach of a contract, it is incumbent on a plaintiff to establish both the elements of a contract and a breach of that contract.[8] For a valid contract to exist it must be demonstrated to involve: (a) parties competent to contract, (b) a proper subject matter, (c) legal consideration, and (d) a mutuality of agreement and obligation.[9] To be successful, a plaintiff is required to demonstrate the breach of the contract and damages resulting from the

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[7] Contract Section C, subsection A, ¶ ¶ 1 and 2.

[8] See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990).

[9] *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991).

breach.[10] The burden of proof rests with the party asserting the breach of contract to establish his damages with "reasonable certainty." Any recovery is limited to those damages, which are demonstrated to be the "direct, natural and proximate result" of the contract breach.[11]

Alliance premised its breach of contract claim on the alleged wrongful termination of its contract with DPS and for refusing to pay for "services that were provided before termination." Contrary to the assertion by Alliance, the termination provision relied on by DPS in severing its relationship with this provider did not require or necessitate an opportunity to cure any performance deficiencies. The termination letter sent by DPS to Alliance clearly designated that the contract provision justifying termination was "C(E)(5)," which states: "The District is also authorized to terminate this contract for any reason authorized under Federal or State law." Alliance's routine and consistent failure to comply with the majority of its obligations under the contract would certainly suffice as justification for DPS' termination under this contractual provision. Alliance mistakenly relies on a separate provision pertaining to a termination that occurs following an erroneous determination of default.[12] Besides there being no evidence to support the application of such a default provision in the factual circumstances of this case, there is no mention within the contract of a right to cure. Despite the absence of any such right, DPS did provide Alliance with several opportunities to correct its invoices and provide the necessary information to secure payment. Alliance consistently failed to respond in a timely manner or to correct the numerous deficiencies cited.

The trial court correctly determined that Alliance's repetitive failure to perform its obligations under the contract resulted in the justifiable termination of the contract by DPS. "[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform."[13] Because Alliance failed to demonstrate that DPS breached the contract, the trial court's ruling on this claim is affirmed.

Alliance also alleged that DPS violated the fair and just treatment clause of the Michigan constitution. The Michigan constitution provides, "The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."[14] This Court has determined:

> The plain text conveys that the protection of "fair and just treatment" applies only "in the course of," or "during," either a "legislative" or "executive" "investigation" or "hearing." Further, the historical context in which this clause was adopted suggests that it was intended to protect against the excesses and abuses of Cold War legislative or executive investigations or hearings. We doubt

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[10] *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

[11] *Id.*

[12] Section C, ¶ E(5).

[13] *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994) (citation omitted).

[14] Const 1963, art 1, § 17.

> that the "common understanding" or "popular mind" at the time of ratification regarded this provision as a protection against the adverse consequences of a run-of-the-mill . . . audit.[15]

Clearly, any investigation undertaken by DPS in an attempt to enforce the terms of its contract with Alliance would not fall within the intended purview of this constitutional provision. Although the trial court ultimately was correct in dismissing this claim, there was no necessity for this claim to proceed to trial, as it should have been disposed of as a question of law on summary disposition.

DPS disputes the award of any monies to Alliance under a theory of unjust enrichment given the trial court's having determined the existence of a valid contract. Initially, the trial court awarded Alliance $32,282.50 based on a theory of unjust enrichment, having determined Alliance was not entitled to monies under the contract with DPS because of their breach. The trial court later increased this award by $11,000 because it determined that Alliance was entitled to a $75 registration fee for 156 eligible children, making the total award to Alliance $43,282.50. This constituted error on a number of levels.

The initial award of $32,282.50 was clearly based on a document prepared by Owens for DPS, at the behest of the trial court, for purposes of settlement. DPS' counsel objected to such use of the document. When questioned regarding the details of the document, Owens indicated that in trying to develop a settlement figure she ignored numerous contractual requirements and invoice deficiencies, which would normally have precluded any entitlement to payment. The trial court erred in using this documentation, which was clearly prepared in an effort to negotiate a settlement to establish actual liability. Such a use is contrary to MRE 408, which states in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Owens indicated that the figure of $32,282.50 did not constitute an amount DPS believed was owed to Alliance under the contract. Rather this figure was derived in an effort to settle the case. Owens asserted that if DPS "followed the letter of the contract [Alliance] would not be eligible for any payment" and that the criteria used in reaching this figure was not applied to any other provider of services under a similar contract. The trial court's use of this amount to establish liability was in error as there was no evidence, under the terms of the contract, that Alliance was entitled to the receipt of any payment or fees.

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[15] *By Lo Oil, Inc v Dep't of Treasury*, 267 Mich App 19, 40; 703 NW2d 822 (2005) (internal citations omitted).

The trial court also erred in determining that Alliance was justified in receiving payment under the equitable theory unjust enrichment. The doctrines of unjust enrichment and quantum meruit comprise equitable remedies that permit the law to imply the existence of a contract in order to prevent an unjust result.[16] These doctrines are only applicable when there is no express contract on the same subject matter.[17] Because the trial court correctly found the existence of a valid contract between the parties, it was error to determine that Alliance was entitled to recover under a theory of unjust enrichment.

To prevail under a claim of unjust enrichment there must be a demonstration of "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant."[18] In other words, to support a claim of unjust enrichment against DPS, Alliance is required to demonstrate not just that it conveyed a benefit, but also that it would be unjust for DPS to retain that benefit.[19] There is absolutely no evidentiary support to sustain the trial court's determination that DPS was enriched or in some manner benefited from the provision of services by Alliance. To the contrary, the evidence clearly demonstrated that DPS was deprived of the ability to seek payment for services to certain eligible students because Alliance's invoices could not meet the requisite minimal criteria for submission to obtain NCLBA funds. Alliance's untimely submission of nonconforming invoices also precluded the potential for payment under a carryover budget. Having failed to establish that DPS actually received any funds for services rendered to eligible students by Alliance, there exists no basis to assume DPS procured a benefit. It is more likely that Alliance's failure to perform cost the district money. Had a proficient provider rendered services to these students, billings could have been submitted and payment rendered through Title I funds from the federal government.

While not referenced by the trial court, Alliance's allegation in its complaint regarding entitlement to payment for services rendered impliedly suggests a claim in quantum meruit. Recovery in quantum meruit is appropriate: (1) if the evidence establishes that the defendants received a benefit from the plaintiff; and (2) an inequity resulted to the plaintiff "because of the retention of the benefit by the defendant[s]."[20] The term "quantum meruit" means "'as much as deserved.'"[21] It is "an equitable principle that measures recovery under an implied contract to pay compensation as reasonable value of services rendered."[22] Consistent with the preclusion of an award under a theory of unjust enrichment, the existence of an express contract prevents

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[16] *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

[17] *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194-195; 729 NW2d 898 (2006).

[18] *Id.* at 195.

[19] *Buell v Orion State Bank*, 327 Mich 43, 56; 41 NW2d 472 (1950).

[20] See *Morris Pumps*, 273 Mich App at 194.

[21] *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 359; 657 NW2d 759 (2002), quoting Black's Law Dictionary (6th ed, 1990), p. 1243.

[22] *Id.* at 358 (quotation marks omitted).

recovery under the theory of quantum meruit.[23] Based on the evidence adduced at trial, there is nothing to suggest that Alliance "deserved" any reimbursement, as it could not satisfactorily document its provision of services. Owens clearly indicated that the documentation provided by Alliance was insufficient to meet its obligations to verify or demonstrate the fulfillment of its contractual responsibilities. Alliance did not present any evidence of the rendering of actual services that were compensable and damages that are speculative or premised on mere conjecture are not recoverable.[24]

The trial court erred in not only its initial award but also by increasing the award to Alliance in the amount of $11,000 for reimbursement fees. Owens provided the only evidence to establish the number of eligible students involved. She calculated 125 students as compared to the 156 determined by the trial court. The only testimony concerning the practice and criteria for payment of registration fees was from Owens. She indicated that historically and with the current contract, registration fees were not paid merely for securing signatures but that the provision of assessment data was also required. The award is contrary to Owens' testimony that "[t]he company charged a registration fee, but the registration fee did not become active until after the pre-test was given and the . . . Individual Education Plan had been completed and the parent had signed off. Section B of the contract, which delineates a "SERVICES AND PRICING SCHEDULE," supports this interpretation. Referencing this chart, Owens testified that payment of the registration fee was contingent on the procurement of parental signatures and completion of pre-evaluation testing. This interpretation would appear to be logical as there is no fee assigned in the chart to conduct an assessment, which could comprise two hours of time for an evaluator. It is nonsensical to assume that a provider would be entitled to $75 for merely procuring a signature to enroll a child, but not receive monies for engaging in the more time consuming use of a professional's services in completing an assessment. We find there exists no basis to sustain the award of any monies to Alliance.

Finally, DPS petitioned for case evaluation sanctions in accordance with MCR 2.403(O). This request was rendered moot when the trial court increased the damage award in favor of Alliance. Based on our finding that the trial court erred in entering an equitable award despite the existence of a valid contract, this matter is remanded to the trial court for further proceedings consistent with an award of sanctions to DPS.

Affirmed in part, vacated in part and remanded to the trial court for further proceedings consistent with this opinion. Pursuant to MCR 7.219(A), for taxation of costs purposes, we find DPS to be the prevailing party in this appeal. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio

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[23] *Biagini v Mocnik*, 369 Mich 657, 659; 120 NW2d 827 (1963).

[24] *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004).